



1958

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Recommended Citation

Voting Trusts in Texas, 12 Sw L.J. 85 (1958)
<https://scholar.smu.edu/smulr/vol12/iss1/5>

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VOTING TRUSTS IN TEXAS

The aim of this comment is to acquaint the reader with the various aspects involved in voting trusts. Included herein is an analysis of the substantive law in this field and suggested provisions to be contained in a voting trust.

LEGALITY OF VOTING TRUSTS

For the primary purpose of combining the voting power of diversely held stock, corporate stockholders often attempt to create an irrevocable voting trust. Originally, this device was utilized in order to circumvent the common law concerning the revocability of proxies and the invalidity of pooling agreements.¹ At first, the courts of many jurisdiction were suspicious of these trusts, seeing in them all sorts of possible abuses; however, gradually they came to the realization that there was nothing inherently abusive in the primary purpose of the voting trust. Instead of arbitrarily striking down all such trusts, the courts began to scrutinize the secondary purposes (the motives) of the agreements which came before them. Today, the following generalization may be made: Those agreements which tend to promote the continued welfare of the corporation will stand while those advancing the selfish interests of the few will be struck down.² More specifically, voting trusts have been held valid when created to aid in such matters as securing a loan for the corporation, or assuring the continuation of productive corporate policies;³ however, those created to maintain control in a certain group for the sole benefit of the group have been held invalid.⁴

In Texas, prior to 1955, the validity of a voting trust as such was questionable due to the dicta in *Roberts v. Whitson*, a case which declared pooling agreements unenforceable as a matter of public policy.⁵ In the light of the Texas Trust Act, which was then in force but not mentioned in the opinion, the *Roberts* case cast a weird shadow.⁶ The act expressly authorizes trustees of stock to enter into

¹ Gose, Legal Characteristics and Consequences of Voting Trusts, 20 Wash. L. Rev. 129 (1945).

² Ballantine, Voting Trusts, Their Abuses and Regulation, 21 Texas L. Rev. 139 (1942); Burke, Voting Trusts Currently Observed, 24 Minn. L. Rev. 347 (1940).

³ H. M. Byllesby & Co. v. Doriot, 25 Del. Ch. 46, 12 A.2d 603 (Ch. 1940); Thomas v. Klesen, 166 Kan. 337, 201 P.2d 663 (1949); Ecclestone v. India-lantic Inc., 319 Mich. 248, 29 N.W.2d 679 (1947); Seward v. American Hardware Co., 161 Va. 610, 171 S.E. 650 (1933). See also Ballantine, supra note 2; Annot., 105 A.L.R. 123 (1936).

⁴ Ibid.

⁵ 188 S.W.2d 875 (Tex. Civ. App. 1945).

⁶ Tex. Rev. Civ. Stat. Ann. arts. 7425b-1 to -47 (1951) (passed in 1943).

pooling agreements and voting trusts; yet, the *Roberts* case held that the owners of the full title to stock could do no such thing. By passing the Texas Trust Act, the legislature certainly did not intend to give a trustee broader powers than those possessed by one who owns full title. If the court had been apprised of the legislative pronouncements concerning pooling agreements and voting trusts, perhaps it would have been hesitant in holding such arrangements to be against public policy.

At present *Roberts v. Whitson* casts no doubt on the validity of voting trusts which have legitimate secondary purposes. The Texas Business Corporation Act, passed in 1955, contains the following provision concerning voting trusts:

Art. 2.30. Voting Trust

A. Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares, for a period of not to exceed ten (10) years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing a counterpart of the agreement with the corporation at its registered office, and by transferring their shares to such trustee or trustees for the purposes of the agreement. The counterpart of the voting trust agreement so deposited with the corporation shall be subjected to the same right of examination by a shareholder of the corporation, in person or by agent or attorney, as are the books and records of the corporation, and shall be subject to examination by any holder of a beneficial interest in the voting trust, either in person or by agent or attorney, at any reasonable time for any proper purpose.

To what extent may a court consider the legitimacy of secondary purposes in view of the generality of article 2.30? Must there be a corporate benefit, or may the trust be created solely to maintain control in a group for that group's benefit? The Texas courts will undoubtedly follow a leading New York case, and will hold that article 2.30 merely establishes the legality of the primary purpose of voting trusts and does not abolish the requirement of a legitimate secondary purpose.⁷

CREATION AND DURATION

There are no Texas cases dealing directly with voting trusts; therefore, in order to discuss article 2.30 and its legal consequences, it is necessary to turn to the decisions of the other states which have similar statutes.

⁷ In re Morse, 247 N.Y. 290, 160 N.E. 374 (1928). "It seems to be recognized that the statutes merely adopt the majority common law view, that voting trusts are valid so long as the aim is to carry out a legitimate business purpose, to promote the best interests of the corporation. . . ." Ballantine, *supra* note 2.

Although article 2.30 defines none of the legal consequences of a voting trust, it does set forth the method of one's creation which, in all likelihood, occupies the field and must be strictly complied with if a valid trust is to be created.⁸ The agreement specifying the terms of the trust must be in writing though, under the Texas Trust Act, this would not be required; *i.e.*, stock may be held on oral trust if the primary purpose of the trust is other than to combine the voting power of diversely held shares.⁹ As in most trusts, there must be a transfer of the res, the stock in this instance to, the trustee.¹⁰ In addition, a counterpart of the agreement must be deposited with the corporation. A failure to deposit such a counterpart has been held not to render the trust invalid, but merely to suspend the right to vote the shares.¹¹

Article 2.30 limits the permissible duration of a voting trust to a period of ten years. Under similar statutes, a failure expressly so to limit the duration of the agreement has been held to render the voting trust void *ab initio*.¹² Obviously, the ten-year period starts from the date of the creation of the trust; however, there is some doubt as to the final event necessary to the creation of the trust. From a careful reading of the statute, it appears that the critical event is the depositing of the counterpart with the corporation; yet, one case has held that the trust comes into existence when the stock is transferred in trust.¹³ One satisfactory way to avoid this problem is expressly to limit the duration of the agreement to a period of less than ten years from the date of the signing of the agreement.¹⁴

It should be noted that one patent prerequisite to being a trust-or-beneficiary of a voting trust is the ownership of voting stock.

⁸ *Perry v. Missouri-Kansas Pipe Line Co.*, 22 Del. Ch. 33, 191 Atl. 823 (Ch. 1937); *In re Morse*, supra note 6; *Appon v. Belle Isle*, 46 A.2d 749 (Del. Ch. 1947). But see *Peck v. Horst*, 175 Kan. 479, 264 P.2d 888 (1954). Concerning the right of a person not a party to the voting trust to attack it, see *Mannheimer v. Keehn*, 41 N.Y.S.2d 542 (Sup. Ct. 1943), and *Ruff v. Darrow*, 184 Ind. 353, 111 N.E. 189 (1916).

⁹ *Tex. Rev. Civ. Stat. Ann. art. 7425b-7* (1951) requires a writing only in the case of a trust relating to realty. *Williams v. Fredericks*, 187 La. 987, 175 So. 642 (1937), holds that a statute requiring a voting trust to be evidenced by a written agreement must be strictly followed.

¹⁰ *Bogert, Handbook of the Law of Trusts* § 32 (1952); *Adams v. Clearance Corp.*, —Del.—, 121 A.2d 302 (1956) (the res of a voting trust is stock).

¹¹ *De Marco v. Paramount Ice Corp.*, 102 N.Y.S.2d 692 (Sup. Ct., Spec. T. 1950).

¹² *Perry v. Missouri-Kansas Pipe Line Co.*, 22 Del. Ch. 33, 191 Atl. 823 (Ch. 1937); *Oppenheimer v. Cassidy*, 345 Ill. App. 212, 102 N.E.2d 678 (1952) (statutory limitation of a voting trust to ten years is not violated by an agreement to extend the trust or to make a new trust, but parties who do not agree are not bound).

¹³ *De Marco v. Paramount Ice Corp.*, supra note 11.

¹⁴ Signing will always precede deposit and transfer; hence, if creation occurs on either deposit or transfer, the limitation on duration will be complied with.

Since a corporation may not vote its own shares, it may not be a party to a voting trust of such shares; consequently, it is not bound by the terms of the trust.¹⁵ Naturally, a corporation may be a party to voting trusts of shares of other corporations.¹⁶

One question which will certainly arise in connection with the creation of these trusts is that of the rights of the parties following the signing of the agreement, but prior to the transfer of the shares and the deposit of the counterpart. Since voting trust agreements are entered into for a consideration (the mutual promises of the trustors to make the transfers in trust), and as there is no adequate remedy at law for a breach, specific performance of the agreement should be granted.¹⁷ However, to avoid the possibility of a denial of specific performance, the signing and the transfers should be made simultaneously.

THE TRUE NATURE OF VOTING TRUSTS AND THE RIGHTS OF THE PARTIES

Is a voting trust a true trust governed by the well-settled principles of trust law, or is it a hybrid legal relationship governed in some instances by trust principles and in others by isolated rulings which yield no uniform doctrine? The desirability of recognizing a voting trust to be a trust in every sense of the word becomes apparent merely from the question posed; nevertheless, a few of the courts early confronted with voting trusts treated them as hybrids. The hybrid theory is well illustrated by several cases holding that for some purposes the beneficiaries have only equitable title to the stock held in trust while for others they have the legal title.¹⁸ Professor Ballantine, in defense of these primeval decisions, has said that "there is ordinarily no justification for . . . a complete stripping of the shareholder of all the safeguards provided by law for his protection."¹⁹ This defense is based on the premise that a beneficiary of a voting trust is a shareholder, and there is more than some reason to believe that the premise is false.

Under the Texas Trust Act and common-law principles the trust-

¹⁵ *Clark v. National Steel Co.*, 82 Conn. 178, 72 Atl. 930 (1909).

¹⁶ *Day v. Hecla Mining Co.*, 126 Wash. 50, 217 Pac. 1 (1923).

¹⁷ Bogert, *op. cit.* *supra* note 9, § 24.

¹⁸ *Wise v. Miller*, 215 Ala. 660, 111 So. 913 (1933); *Chandler v. Bellanca Aircraft Corp.*, 19 Del. Ch. 57, 162 Atl. 63 (Ch. 1932); *O'Grady v. United States Ind. Telephone Co.*, 75 N.J. Eq. 301, 71 Atl. 1040 (Ct. Err. & App. 1909); *Matter of Bacon*, 287 N.Y. 1, 38 N.E.2d 105 (1941) (appraisal rights); *Koppel v. Middle States Petroleum Corp.*, 282 App. Div. 662, 122 N.Y.S.2d 802 (1st Dept. 1953); *Hayman v. Morris*, 36 N.Y.S.2d 756 (Sup. Ct., Spec. T. 1942); *Smith v. Bramwell*, 146 Ore. 611, 31 P.2d 647 (1934) (derivative suit).

¹⁹ Ballantine, *Corporations* § 184b (rev. ed. 1946).

tee of an express trust of stock holds the legal title to the stock.²⁰ Thus, upon the creation of the trust, the *trustee*, as holder of the legal title to the stock, becomes the *shareholder*. That the trustee is the shareholder is well supported by the Texas Trust Act which gives the trustee *all of the powers of an absolute owner*.²¹ When the trustor transfers the stock to the trustee and becomes a *cestui que trust*, he retains merely a beneficial interest in the shares which is often referred to as equitable title.²²

There is nothing mystical about the term voting trust; it merely serves to designate an express trust which has been created for the primary purpose of combining the voting power of stock. Article 2.30 is couched in the phraseology of trust law and certainly does not indicate that a voting trust is anything other than a true trust. The following provision of the statute merits special consideration:

The counterpart of the voting trust agreement so deposited with the corporation shall be subject to . . . examination by a *shareholder of the corporation . . . and shall be subject to examination by any holder of a beneficial interest in the voting trust* (Emphasis added.)

Here the legislature has clearly distinguished between the rights of shareholders of the corporation and the rights of the beneficiaries of the trust. How has the Texas Bar Committee construed the above provision? It has stated that although the beneficiary has a right to examine the counterpart deposited with the corporation, it does not follow that he also has the right of a shareholder to examine the books and records of the corporation.²³ The conclusion of the Bar Committee is only a corollary to the proposition that a *cestui que trust* of a voting trust is not a shareholder. The trustor-beneficiary completely and voluntarily severs his connection with the corporation by entering into the trust; henceforth, he should look to the trustee, who is required to act in his best interest, to enforce any of the rights evolving from the stock.²⁴ For instance, the trustee, and only the trustee, should be allowed to exercise the right of

²⁰ Tex. Rev. Civ. Stat. Ann. art. 7425b-7; *Kann v. Rosset*, 307 Ill. App. 153, 30 N.E.2d 204 (1940); *Wetmore v. Porter*, 92 N.Y. 76 (1883); *Bogert*, op. cit. supra note 9, § 1.

²¹ Tex. Rev. Civ. Stat. Ann. art. 7525b-25 (F) (1951); *Crowder v. Sperry Corp.*, 41 Del. 84, 15 A.2d 661 (Super. Ct. 1940). *Gose*, supra note 1, offers perhaps the most cogent analysis of the status of the various parties to the voting trust.

²² *Crowder v. Sperry Corp.*, 41 Del. 84, 15 A.2d 661 (Super. Ct. 1940). Note that the status of a beneficiary of a true trust is always that of a holder of a beneficial interest in the res.

²³ Comment of the Bar Committee, 3A Tex. Rev. Civ. Stat. Ann. 120 (1956). For a case from another jurisdiction which is directly on point, see the *Crowder* case, *ibid.*

²⁴ "In law he is a stranger to the corporation." *Crowder v. Sperry Corp.*, 41 Del. 84, 15A.2d 661 (Super. Ct. 1940). See also *Brown v. McLanahan*, 58 F. Supp. 345 (D. Md. 1944); *Ballantine*, op. cit. supra note 18, § 184b.

a shareholder to bring a derivative suit, or to obtain an appraisal of shares.²⁵

In the absence of limitations embodied in the trust instrument, the trustee has the right to receive dividends, and to vote, either in person or by proxy, upon any matter on which a shareholder may vote. He may vote on mergers, consolidations, sales of substantially all of the assets, and charter amendments.²⁶ Further, the trustee has the power to sell the stock he holds in trust if such a sale is reasonable and prudent.²⁷ These powers remain in the trustee until the expiration of the trust; on expiration, the trustee has only the authority to wind up the trust in accordance with its terms.²⁸ If a trustee votes undistributed stock after the expiration of the trust, the votes are void.²⁹

Although the trustee has the aforementioned powers, he may not exercise them if by doing so he would frustrate the purposes of the trust;³⁰ as a corollary, the trustee may not sell the stock if it appears from the terms of the trust that the trustor intended the res to be retained in specie.³¹ In most voting trusts, it is contemplated that the shares will be returned to the trustors upon the termination of the trust; hence, in such cases, if the trustee sold the stock, or voted for dissolution or any other similar act, he would violate the trust. If, however, the secondary purpose of the voting trust is to aid in expediting a dissolution or merger, or to assist in effecting a sale of the assets, the trustee may and should act accordingly. The voting power is held in abeyance if it would be a violation of the trust for the trustee to vote; therefore, it is advisable, when drafting an agreement, to set forth a procedure to be followed in the event a vote is taken on any of the extraordinary matters mentioned above.³² Frequently, the agreement provides that the trustee shall have the power to vote on certain named matters only in accordance with

²⁵ This follows from an application of the trust theory. But see *Matter of Bacon*, 287 N.Y. 1, 38 N.E.2d 105 (1941) (appraisal rights); *Smith v. Bramwell*, 146 Ore. 611, 31 P.2d 647 (1934) (derivative suit).

²⁶ Tex. Rev. Civ. Stat. Ann. arts. 7425b-25(B), (F) (1951).

²⁷ Tex. Rev. Civ. Stat. Ann. art. 7425b-25(B) (1951). But see *Ohio Nat'l Life Ins. Co. v. Struble*, 82 Ohio App. 480, 81 N.E.2d 622 (1948); *Gahagan v. Texas & P. Ry.*, 231 S.W.2d 762 (Tex. Civ. App. 1950).

²⁸ Tex. Rev. Civ. Stat. Ann. art. 7425b-42 (1951); *Commissioner v. Davis*, 132 F.2d 644 (1st Cir. 1943); *Restatement, Trusts* §§ 344, 345, 347 (1935).

²⁹ *Clemmer v. Morgan*, 77 Pa. D. & C. 405 (1952).

³⁰ *Restatement, Trusts* § 190 (1935). "Whether a trustee has the power of sale depends upon . . . the purposes of the trust." *Scott, Cases on Trusts* 369 (4th ed. 1951).

³¹ *Ibid.*

³² *Gose*, *supra* note 1. Simply, the trustee's fiduciary duty prevents his voting, and the beneficiary, not being a shareholder, has no right to vote the shares.

the will of the beneficiaries as determined by their vote at a meeting called pursuant to the agreement.³³

It has been held that a court has no power to appoint a voting trustee.³⁴ If such a rule were to be applied in all instances, it would be in direct contravention of the well-established trust principle that a trust will not fail for want of a trustee.³⁵ In certain cases, however, this holding may be justified by an exception to the general principle, which operates to prevent the court from appointing a trustee when it was the intent of the trustor that the trust should fail if the named trustee did not hold the office, or the purpose of the trust could be realized only if the named trustee holds the office.³⁶ The Texas Trust Act merely recognized the authority of the court to fill vacancies except in the case of the death of one of several trustees, in which instance the survivor or survivors may execute the trust.³⁷ The exercise of the court's authority should be determined by reference to the general principle and its exception.

VOTING TRUST CERTIFICATES

Customarily, voting trust certificates are issued to evidence the ownership of a beneficial interest in the trust and are made alienable in the same manner as the stock of the corporation.³⁸ In some jurisdictions, these certificates have been brought within the Uniform Stock Transfer Act,³⁹ and have been held to be subject to the same rules concerning restraints against alienation which govern as to corporate stocks.⁴⁰ Both the Texas and the federal Blue Sky laws embrace voting trust certificates; therefore, the issuance must be in compliance with the statutes unless exempt by reason of smallness (Texas) or privacy (federal) of offering.⁴¹ Although the exchange of stock for voting trust certificates has no income tax consequences, it is subject to the property transfer stamp tax.⁴² The income received by the trust is, of course, taxed in accordance with

³³ See p. 93 *infra*.

³⁴ *Nat'l Liberty Ins. Co. v. Bank of America*, 126 Misc. 753, 214 N.Y. Supp. 643 (Sup. Ct. 1926) (discussed in detail in Gose, *supra* note 1).

³⁵ Restatement, Trusts § 108 (1935).

³⁶ *Id.* at § 101(b) (1935).

³⁷ Tex. Rev. Civ. Stat. Ann. art. 7425b-37, -39, -18(B) (1951).

³⁸ See note 19 *supra*.

³⁹ Wash. Rev. Stat. §§ 3803-29 (Remington 1945); see also Tex. Rev. Civ. Stat. Ann. art. 1358-1 to -26 (1951).

⁴⁰ *Tracey v. Franklin*, 31 Del. Ch. 477, 67 A.2d 56 (Sup. Ct. 1949).

⁴¹ Tex. Rev. Civ. Stat. Ann. art. 600a-2(a) (1956); Ballantine, Lattin, and Jennings, *Materials on Corporations* 499 (1955). A detailed discussion of the Blue Sky Laws is beyond the scope of this comment; however, the importance of a careful analysis of such statutes cannot be overemphasized.

⁴² 14 Fletcher, *Corporations* § 6907 (rev. ed. 1946).

the provisions of the Internal Revenue Code which concern trust income.⁴³

PROVISIONS OF A VOTING TRUST AGREEMENT

Naturally, the provisions in voting trust agreements will vary; however, certain provisions should appear in every such agreement. Formbooks, unfortunately, furnish very little assistance in drafting voting trusts, for the few agreements found there are far too abbreviated and often contain contradictory provisions. It is hoped that the following annotated suggestions as to provisions will assist in drafting instruments which leave as little as possible to chance.

Date of Execution and Parties to the Agreement. The agreement will be effective as of the date of execution.⁴⁴ The only parties to the agreement are the trustor-beneficiaries and the trustees; the corporation is not a party.⁴⁵ The following is from a well-drafted open voting trust agreement:

Agreement executed the _____ day of _____, 19____, by and between John Doe and Richard Roe (hereinafter called "the beneficiaries"), shareholders of the common stock of XYZ, Inc., a corporation of the State of Texas (hereinafter called "the company"), [and such other shareholders of voting stock of said corporation as may become parties thereto by depositing their shares of stock as provided below (also hereinafter called "the beneficiaries"),] and John Smith (hereinafter called "the trustee"),

By deleting the clause enclosed by brackets, the trust may be converted from one which is open to shareholders who subsequently desire to join to one which is closed.

Recitation of the Secondary Purposes of the Trust. The wisdom of such a provision is self-evident, since the trustee must act in accordance with the purposes of the trust.⁴⁶

Recitation of the Consideration. This recitation is not essential but is customary.

Transfer of the Stock to the Trustee. It is usually desirable to have this transfer take place simultaneously with the execution of the agreement. The trustee should then be required to cause the stock to be transferred to him, as trustee, on the books of the company.⁴⁷

⁴³ Int. Rev. Code of 1954, §§ 641-678, 68A Stat. 215-231 (1954).

⁴⁴ See p. 87 *supra*.

⁴⁵ See p. 88 *supra*.

⁴⁶ See 5 Fletcher, Corporations § 2081 (rev. ed. 1952) for a discussion of the effect of the purpose as disclosed by the agreement.

⁴⁷ To effectively administer the trust, the trustees need the advantage of being the record holder of the shares.

Who May Become a Beneficiary. If the trust is to be open, the requisites to becoming subsequent beneficiaries should be set out. The normal requisites are either ownership of voting stock or the purchase of a certificate from a beneficiary.⁴⁸

Method of Entering into the Voting Trust. Again, if the trust is to be open, the method for entering into it subsequent to its creation should be provided.⁴⁹ The usual methods are to transfer stock to the trustee and accept voting trust certificates in return, or to purchase voting trust certificates from a beneficiary. The agreement should provide that by accepting the certificate the transferee becomes a party to the agreement and is embraced within the meaning of the term "beneficiary" as used in the agreement. The acceptance of the certificate should, by express provision, have the same effect as subscribing to the original agreement.

Depositing the Counterpart of the Agreement with the Corporation. Article 2.30 requires that a counterpart be deposited with the corporation. The power to vote will probably be suspended until the deposit is made; therefore, the trustee should be charged with making the deposit within a brief span of time.⁵⁰ A recitation of the beneficiaries' right to inspect the counterpart would be desirable.

Authority of the Trustees. The powers of the trustees may be limited in any manner desired.⁵¹ In the absence of limitations in the agreement, the trustees have all of the powers of an absolute owner.⁵² Even though the trustees' fiduciary duty may prevent them from exercising certain of their powers, it is best expressly to limit the powers in the instrument.⁵³ Normally, the trustees are expressly prohibited from selling the stock held in trust. Often there are limitations providing that without the consent of the holders of trust certificates representing a certain percentage of shares held in trust, the trustees may not vote in favor of or execute any consent with respect to: (a) increases in capital stock; (b) sales or mortgages of substantially all of the assets of the company; (c) dissolution of the company; (d) charter amendments; (e) consolidation or merger; or (f) partial liquidation. It is wise to provide that the consent of the beneficiaries may be given either in writing or at a meeting called pursuant to the terms of the agreement. Of course,

⁴⁸ Obviously, non-voting shares would be of little value to a voting trust. See p. 88 *supra*, as to corporations as beneficiaries.

⁴⁹ Restatement, Trusts §§ 331, 337, 338 (1935).

⁵⁰ See note 11 *supra*.

⁵¹ Tex. Rev. Civ. Stat. Ann. art. 7425b-22 to -25 (1951).

⁵² See note 21 *supra*.

⁵³ See note 30 *supra*.

any other limitation desired should be made explicit. The trustees should be authorized to engage counsel or agents and be reimbursed therefor. Also, the instrument should expressly permit them to be directors or officers of the corporation, to contract with it in any manner, and to vote their own shares as they so desire; otherwise, such conduct may involve a possible breach of fiduciary duty.⁵⁴ It is often advisable to make the trustees' construction of the voting trust agreement binding if made in good faith; this would tend to prevent litigation in the event there is an ambiguity in the instrument. The Texas Trust Act requires a bond but this is often waived in the agreement.⁵⁵

Liability of Trustees. The liability of trustees is covered by the Texas Trust Act, and any limitation on this fiduciary liability must be provided for in the agreement.⁵⁶ The customary standard of conduct imposed is the use of best judgment in the absence of willful misfeasance or gross negligence. Naturally, the trustees will be liable for any breach of duty expressly imposed by the agreement.

Meeting of Trust Certificate Holders. If the trustees' powers are limited, he should be allowed to call a meeting to obtain the required consent of the beneficiaries. A notice in writing setting forth the time, place, and purpose of the meeting, to be mailed a reasonable time in advance, should be required. The necessary quorum and voting qualifications should be established. Usually, only record holders of trust certificates may vote, and they may have only one vote for each share of voting stock represented by trust certificates standing in their name, but may vote by proxy if they so desire. Also, provision should be made for calling a meeting at the request of a certain percentage of the certificate holders.

Right to Appraisal. If the trustee obtains the required consent of the beneficiaries in connection with the limitations (if any) on his authority to vote, he may vote all of the shares he holds in trust although some of the beneficiaries may have dissented.⁵⁷ Under the trust theory, the right to appraisal of the stock runs to the trustee.⁵⁸ Hence, if a beneficiary is to have a similar right upon dissenting, it must be given to him in the agreement. One method for accomplishing this purpose would be to allow a dissenting beneficiary to surrender his voting trust certificates in return for a representative number

⁵⁴ Bogert, *op. cit.* supra note 9, § 95.

⁵⁵ Tex. Rev. Civ. Stat. Ann. art. 7425b-25 (L) (1951).

⁵⁶ *Id.* at art. 7425b-19 to -25 (1951).

⁵⁷ *Scott v. Arden Farms*, 28 A.2d 81 (Del. Ch. 1942). The purpose of a voting trust is to secure the combined vote of all the parties.

⁵⁸ See p. 90 *supra*.

of shares of stock held in trust. He could then dissent at the corporate shareholder meeting and thereby obtain a right to appraisal.⁵⁹

Method of Action by the Trustees. If there is more than one trustee, provision should be made for meetings of the trustees to determine administrative policies, and the necessary quorum should be established. If there are an equal number of trustees, a method of arbitration should be prescribed. Also, no matter what the number of trustees may be, the agreement should specify whether or not a majority may dictate the manner in which the stock held in trust shall be voted.⁶⁰

Successor Trustees. The method employed for selection of successors, of course, may vary; however, in trusts having a large number of beneficiaries, it is usually more feasible to allow the remaining trustees to appoint a successor in the event a vacancy occurs. In anticipation of a complete vacancy in the office of trustee, an alternative provision allowing the selection to be made by the beneficiaries should be inserted. In this paragraph, it is common to provide a method for the removal of a trustee,⁶¹ and, also the manner in which a trustee may resign.⁶²

Dividends. The trustees are entitled to receive any dividends declared.⁶³ Hence, there should be a provision to the effect that the trustees shall make payments to the record holders of trust certificates equal in amount to any payments collected by the trustees, or shall issue trust certificates to holders of record of trust certificates equal in number to any shares of stock received by the trustees as dividends or in partial liquidation upon a like number of shares held by the trustees under the terms of the trust.

Books and Records. The trustees should be required to keep all books and records necessary and proper to the administration of the trust. They should be allowed to close the transfer records or fix a record date in order to determine who is entitled to vote, to receive payment, or to be issued trust certificates under the terms of the trust. Also, the beneficiaries should be authorized to inspect all books and records.

Expenses and Indemnity. Ordinarily, the trustees are expressly authorized to incur all expenses in connection with the trust which

⁵⁹ Shareholder has to be given sufficient notice to enable him to withdraw from the trust and establish himself as a record holder of shares to meet the qualification imposed by the Texas Business Corporation Act.

⁶⁰ Tex. Rev. Civ. Stat. Ann. art. 7425b-18 (1951) (majority control).

⁶¹ Id. at art. 7425b-39 (1951) (power of the court).

⁶² Id. at art. 7425b-38 (1951) (power of the court).

⁶³ See p. 90 *supra*.

are necessary and reasonable, and are entitled to be reimbursed by the beneficiaries.⁶⁴ The trustees' right to indemnity should be set forth.⁶⁵ To secure their right to indemnity and reimbursement, they are often given a lien on the stock held in trust to the extent that they have not been repaid on a specified date. Either monthly or annually, each beneficiary should be notified in writing by the trustees of the prorata amount (as determined by the number of trust certificates held by the beneficiaries) to be repaid. Further security may be afforded the trustees by allowing them to withhold income payable to the beneficiaries until repayment is made.

Taxes. The authority to pay taxes and to be reimbursed therefor should be recited.⁶⁶ An express lien and the right to withhold income are customarily given as security.

Compensation. The trustees' right to compensation, if any, should be expressed.⁶⁷

Subscriptions—Preemptive Rights. The trustee, as stockholder, may exercise any preemptive rights which might arise in connection with the stock held in trust.⁶⁸ Hence, most instruments should provide that the record holders of trust certificates may notify the trustee to subscribe and pay him for the shares. Upon payment by the record holder, the trustee should issue a proportionate number of voting trust certificates. The extent to which a beneficiary may exercise these rights should be governed by the number of trust certificates he holds.⁶⁹

Trust Certificate. The trustee should issue and deliver to each of the beneficiaries certificates: (a) for the number of shares transferred by him to the trustee; (b) for the number of shares subscribed for by the trustee, as trustee, pursuant to the provision concerning preemptive rights; and (c) as otherwise directed by the terms of the agreement.⁷⁰ Fractional interests in the trust are treated in the same manner as fractional interests in voting stock in order to avoid confusion. The form of the certificates should be set forth in the agreement, and should contain a synopsis of the terms of the trust. Generally, the provisions contained in the company's

⁶⁴ Tex. Rev. Civ. Stat. Ann. arts. 7425b-25 (F), (H), (I) (3), 7425b-36 (1951).

⁶⁵ Id. at arts. 7425b-20, 7425b-25 (1951).

⁶⁶ Id. at art. 7425b-25 (I) (3), (K) (1951).

⁶⁷ 4 Bogert, Trusts and Trustees § 974-78 (1951).

⁶⁸ Tex. Rev. Civ. Stat. Ann. art. 7425b-25(F) (1951).

⁶⁹ However, it may be desirable to allow the beneficiaries greater than pro rata participation. It would appear they could pool their rights under the trust agreement.

⁷⁰ Such a provision should serve to guard against possible ambiguities in the instrument in relation to the trustee's duty to issue certificate. Note that art. 2.30 does not require certificates.

certificate of incorporation pertaining to the rights, options, and restrictions on transfers of stock are made applicable to the trust certificates, and enumerated therein. If the Uniform Stock Transfer Act is held to encompass trust certificates, a failure to enumerate restrictions upon transfers would allow a purchaser without notice to take free of such restrictions.⁷¹ In case of conflict between the terms of the certificate and the terms of the trust agreement, the trust agreement should control, and there should be a clear and unambiguous statement to this effect upon the face of the certificate. If there are many beneficiaries, it will be convenient to authorize the trustee to appoint an agent to issue certificates and to transfer them upon the books of the trustee. The agent is, normally, allowed to resign upon giving a certain number of days notice in writing to the trustees, and is, usually, liable only for willful misfeasance.⁷² Since the corporate statutes have, under the trust theory, no bearing on the administration of the trust, the method of issuing duplicate certificates if originals are lost or stolen should be established.⁷³

Amendment of the Agreement. The right to amend the agreement must be expressed and the manner in which the agreement may be amended should be prescribed.⁷⁴

Revocation of the Trust. The Texas Trust Act, as opposed to the common law, makes all trusts revocable unless expressly made irrevocable.⁷⁵ Obviously, revocability would defeat the purpose of a voting trust and should be guarded against by inserting a provision clearly establishing the irrevocable nature of the trust. Often, however, it is desirable to provide that the trust may be revoked by the vote of a certain percentage of the record holders, but only by such a vote.

Partial Invalidity. Customarily, a provision is incorporated which is designed to save the trust in the event that some of the provisions are held to be invalid.

Trust Relationship. Due to the unsettled status of the voting trust,⁷⁶ wisdom dictates a provision to the effect that the agreement and the transfers made pursuant to it shall be deemed to create a trust as defined and governed under the terms of the Texas Trust Act.

⁷¹ See note 39 supra.

⁷² The provision is ordinarily inserted as a basis for bargaining; transfer agents have greater bargaining power.

⁷³ *Atkins Corp. v. Tourney*, 6 Cal. 2d 206, 57 P.2d 480 (1936).

⁷⁴ Tex. Rev. Civ. Stat. Ann. art. 7425b-22 (1951).

⁷⁵ *Id.* at art. 7425b-41 (1951). *Thomas v. Kliesen*, 166 Kan. 337, 201 P.2d 663 (1949); *Herman v. Dereszewski*, 312 Mich. 244, 20 N.W.2d 176 (1945).

⁷⁶ A reading of but a few of the cases cited herein will convince even the most dubious reader that this statement is true.

Situs of the Trust. In order to avoid conflicts of law, and to establish venue,⁷⁷ the agreement should recite where it is executed and where it is to be performed.

Duration and Termination. As noted previously, a voting trust may not last longer than ten years, and one which could possibly last for a longer period is void at the outset.⁷⁸ Hence, the agreement must expressly provide that if a power to revoke the trust has not previously been exercised the trust shall terminate automatically on a certain date which comes within the statutory period. On the date of termination, the trustee should be required, upon surrender of the trust certificates, to deliver to the holders thereof shares of stock of the company equal in number to the shares represented by the trust certificates surrendered. In the absence of such a provision, upon termination, a resulting trust would arise in favor of the trustor-beneficiaries; and, although they had not surrendered their certificates, they could compel the trustee to transfer the shares to them.⁷⁹ The instrument should establish the fact, that, upon termination, the certificates have no further effect and the holders have no further rights except to exchange their certificates for stock. A clear distinction should be drawn between "termination" and "winding up the trust." Following termination of the trust, the trustee may no longer exercise the powers of ownership; however, until the trust is wound up, the trustee has the authority to collect and pay claims arising out of the trust, and to distribute the shares which were held in trust. Upon winding up the trust, the trustee is discharged.⁸⁰

Definitions. It is usually advisable to define certain terms used in the instrument.

Final paragraph. The following form is suggested:

In Witness Whereof, the voting trustees have hereunto set their hands as of the day and year first above written, and the beneficiaries have [either] signed this agreement [or have transferred and delivered their shares of stock to the voting trustees and accepted trust certificates therefor].

If the trust is to be closed, the words enclosed by brackets should be deleted.

Signatures. All of the parties to the agreement should sign the in-

⁷⁷ Tex. Rev. Civ. Stat. Ann. art. 7425b-24 (1951).

⁷⁸ See notes 12, 13, 14 *supra*.

⁷⁹ Bogert, *op. cit. supra* note 9, §§ 75, 149, 155; note that the certificate is merely evidence of ownership.

⁸⁰ *Clemmer v. Morgan*, 77 Pa. D. & C. 405 (1952); see note 28, *supra*.

strument if the trust is to be closed; however, in the case of an open trust, the subsequent beneficiaries need not sign.⁸¹ Of course, the signatures should each be acknowledged before a notary public.

George B. Davis

⁸¹ See Method of Entering into the Voting Trust, p. 93 *supra*.